No. 87-237

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

KEITH MILTON RHINEHART
and
THE AQUARIAN FOUNDATION,
Appellants,
v.
KIRO, INC.;
FISHER BROADCASTING INC.;
KOMO;
and
JANE DOE SANDIFER, his wife,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES' JOINT MOTION TO DISMISS

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September 10, 1987

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RESTATEMENT OF QUESTION PRESENTED

Were Appellants' constitutional rights adequately protected when a court ordered production of certain documents and videotapes relevant to their defamation action and when, after Appellants repeatedly refused to comply with the court's order, it dismissed Appellants' action against Appellees?

PARTIES TO PROCEEDINGS BELOW

The parties before the trial court were as follows:

Plaintiffs: Keith Milton Rhinehart; The Aquarian Foundation; William R. Powers and Lila Lee Powers, husband and wife, doing business as Powers Studio.

Defendants: KIRO, Inc.; Fisher Broadcasting Inc.; KOMO; John Sandifer and Jane Doe Sandifer, husband and wife; Tribune Publishing Co., Inc.; Richard Sypher and Jane Doe Sypher, husband and wife; Joan Dumenchuk and John Doe Dumenchuk, husband and wife; and Starr Elliott.

Appellants in this proceeding are Keith Milton Rhinehart and The Aquarian Foundation. Appellees are KIRO, Inc.; Fisher Broadcasting Inc.; KOMO; and John Sandifer and Jane Doe Sandifer, husband and wife.[1]

KIRO, Inc. is a Utah corporation. Its parent company is Bonneville International Corporation, also a Utah corporation. All subsidiaries of Bonneville International Corporation are wholly owned.

Fisher Broadcasting Inc. is a Washington corporation. Its parent company is Fisher Companies Inc., also a Washington corporation. All subsidiaries of Fisher Broadcasting Inc. are wholly owned.

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[1] Appellants' Jurisdictional Statement incorrectly identifies "Tribune Publishing Co., Inc., *et al.*" as "Appellees." Tribune Publishing Co., Inc., Richard Sypher and Jane Doe Sypher, Joan Dumenchuk and John Doe Dumenchuk, and Starr Elliott were not involved in the discovery dispute that resulted in dismissal of Appellants' claims and are not among Appellees here.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES' JOINT MOTION TO DISMISS

Pursuant to Supreme Court Rule 16.1, Appellees move to dismiss the appeal filed on behalf of Keith Milton Rhinehart and The Aquarian Foundation (hereinafter "Appellants") on the ground that the questions presented are insubstantial and have been previously decided by this Court.

STATE LAW INVOLVED

The appeal raises the question of the validity of Washington Superior Court Civil Rule ("Civil Rule") 37(b)(2)(C) as applied to Appellants. Civil Rule 37(b) sets forth sanctions available against a party that fails to comply with a court

order compelling discovery. In pertinent part, Civil Rule 37(b)(2) provides as follows:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or *dismissing the action* or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(Emphasis added.)

RESTATEMENT OF FACTS

A. Background.

Rhinehart is the self-styled "spiritual leader" of the Aquarian Foundation, a Seattle-based spiritualist church. In December 1979, Rhinehart and nine members of his church traveled to Bogota, Columbia, to attend a parapsychology convention. While in Bogota, they were arrested and charged with fraud in the conduct of a seance. KIRO Newsradio ("KIRO") and KOMO News ("KOMO"), along with other Seattle news media, broadcast reports of these arrests.

KIRO's broadcasts prompted telephone calls from former members of the Aquarian Foundation. The callers charged that Rhinehart used the Aquarian Foundation to bilk money from members through the sale of "jewels" supposedly produced from various orifices of Rhinehart's body ("apportation"). KIRO reported these charges and broadcast portions of the callers' statements about the "jewels."

Rhinehart, the Aquarian Foundation, and two Foundation members sued KIRO, KOMO, and other news media sources, reporters and publishers. The complaint alleged, *inter alia*, that Rhinehart was a private figure; that KIRO's and KOMO's broadcast contained false statements and made false innuendos about Rhinehart and the Foundation; that KIRO and KOMO were both negligent and malicious in making these broadcasts; and that Rhinehart and the Foundation had, as a result, lost income and donations. In their answers, KIRO and KOMO denied these allegations.

B. Early Discovery Efforts.

KIRO began discovery soon after the complaint was filed to elicit the factual basis for Appellants' claims. In late 1981 and early 1982, KIRO served upon Appellants interrogatories and requests for production designed to elicit the factual basis for their claims of liability and damages. Appellants failed to respond, despite KIRO's extension of time, and in 1982 KIRO filed its first motion to compel. On the eve of hearing, Appellants served objections and partial answers, and KIRO struck its motion.

Despite inadequacies in Appellants' answers, KIRO elected not to press its discovery requests until the Washington Supreme Court determined the validity of similar objections to discovery asserted by Rhinehart in a separate, though similar action against The Seattle Times and other media defendants.[2] On December 2, 1982, the Washington Supreme Court affirmed both the trial court's order compelling

[2] In that action for defamation and invasion of privacy, Rhinehart and other plaintiffs resisted disclosure of membership lists and financial information. There, as in the present case, Rhinehart and the other plaintiffs refused to comply with the trial court's order compelling production despite the trial court's entry of a protective order.

production and its protective order limiting the defendants' use of that information in the other case. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982).

After the Washington Supreme Court had denied motions for reconsideration and refused to stay its mandate in the *Seattle Times* case, KIRO's attorney contacted Appellants' attorney numerous times during April and May 1983 in an effort to obtain complete answers to discovery requests concerning Appellants' allegations that Rhinehart was a private figure, that the statements made by KIRO were false, and that Rhinehart and the Foundation were damaged through loss of members and donations as a result of the statements. Specifically, KIRO sought information concerning members, donors, and financial contributions; civil and criminal litigation in which Appellants had been involved; publications and telecasts regarding Appellants; and the phenomenon of "apportation."[3] Despite repeated assurances from Appellants' attorney that the requested information would be forthcoming, KIRO had received nothing by May 26, 1983.

On that date, KIRO filed its second motion for an order compelling discovery and, in addition, sought terms. KIRO indicated that it would stipulate to entry of a protective order identical to that entered and affirmed in the *Seattle Times* case.

Appellants flatly rejected any protective order. Instead, Appellants filed a motion for a stay of all discovery proceedings.

After the parties' respective motions were consolidated for hearing, Appellants served what they termed "supplemental" answers to KIRO's first set of discovery requests. These answers identified 169 newspaper articles concerning Rhinehart and the Foundation. None of the articles, however, was produced.

C. The June 6 Order Compelling Production and Assessing Terms.

On June 6, 1983, the trial court heard KIRO's motion to compel discovery and Appellants' motion for a stay of all proceedings. Appellants' motion was denied. In response to KIRO's motion, the trial court ordered Appellants to disclose membership and financial information, subject to the terms of a protective order mirroring that approved by the Washington Supreme Court in the *Seattle Times* case. The trial court did, however, stay the effect of its order until final resolution of the *Seattle Times* case by this Court.[4] As a result, Appellants did not have to produce any membership or financial information until this Court issued its decision affirming the Washington Supreme Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The trial court's protective order did not cover any other information.

Also, on June 6, 1983, the trial court ordered Appellants to answer fully KIRO's interrogatories and produce all documents relating to KIRO's other discovery requests no later than July 15, 1983. In response to Appellants' violations of discovery requirements, the trial court awarded $300.00 in terms to KIRO. The trial court also warned Appellants at that time that it would entertain a motion for further sanctions, including dismissal, if the July 15 deadline was not met.

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[3] Appellants alluded to the phenomenon of apportation in their answers to interrogatories inquiring about gems or other objects produced from Rhinehart's body. "Apport" is defined as "motion or production of an object, by a spiritualistic medium, without apparent physical agency; also, the object so produced." *Webster's New International Dictionary* 132 (2d ed. 1950).

[4] Both parties in the *Seattle Times* case sought review by this Court via separate petitions for certiorari. Plaintiffs' petition for certiorari was denied, 467 U.S. 1230 (1984), while defendants' was granted, 464 U.S. 812 (1983).

Appellants paid the terms but totally ignored the trial court's July 15 deadline for responding to the discovery requests. After a further request from KIRO's attorney, on July 21, 1983, Appellants served an unsigned slightly revised version of their previous "supplemental" answers, together with an unsigned verification of those answers by Rhinehart. KIRO received signed copies six days later.

The revised answers included five pages of new (and untimely) objections to KIRO's discovery requests. Among the new objections raised by Appellants on July 22, 1983 was a demand for a protective order governing all pretrial discovery material. At this point, Appellants also objected

> to producing any of our sacred films outside of their religious context and without the defendants coming to church and viewing our sacred films in a proper, sincere religious context, explained by me [Rhinehart] during the presentation.

On July 22, 1983, KIRO's attorney sought to review and copy the written documents, chiefly newspaper articles, that Appellants had identified in their supplemental answers. Appellants' attorney refused to permit copying of more than a few of them unless KIRO entered into a stipulation restricting their use. Only after KIRO had begun preparing a motion to compel did Appellants, on July 27, 1983, release an incomplete set of documents.

Because of the imminence of Rhinehart's deposition, KIRO asked by a letter of July 29, 1983, that complete information be provided and related documents disclosed no later than August 1. When that deadline passed, KIRO filed its third motion for an order compelling discovery and, as in its second motion, sought sanctions.

Appellants responded to KIRO's motion by serving so-called "Second Supplemental Answers to Interrogatories."

consisting almost entirely of argument and objections, and (for the first time) a motion for a protective order. Among other things, Appellants' proposed protective order would have prohibited KIRO from copying any videotape or any printed material describing or referring to Appellants' religious practices. Many of the restrictions in the proposed protective order would have extended to information and documents already obtained from Appellants during discovery.

During this period, Appellants also frustrated KOMO's discovery efforts. KOMO served interrogatories on both Rhinehart and the Foundation in late June 1983. Despite Appellants' repeated assurances that answers would be forthcoming, Appellants did not respond to the interrogatories.

KOMO thereupon filed a motion to compel discovery, which was consolidated with KIRO's third motion. Both motions, as well as Appellants' belated motion for a protective order, were heard on August 11, 1983.

D. The August 11 Order Compelling Production and Granting Terms.

After argument, the trial court ordered Appellants to (a) produce three videotapes depicting public performances by Rhinehart no later than 12:00 noon on September 6, 1983; (b) pay KIRO terms of $750.00 by the same deadline; and (c) disclose documents prepared by Rhinehart or the Foundation that mentioned the phenomenon of "apportation." The trial court indicated that it would be inclined to dismiss Appellants' claims if the September 6 deadline was ignored. The trial court also ordered Appellants to respond to KOMO's interrogatories by September 12. In response to Appellants' concerns, the trial court imposed stringent limitations on copying and publication of videotapes and documents.

The September 6 deadline was ignored. The September 12 deadline for answering KOMO's interrogatories also was ignored.

Both KIRO and KOMO moved for dismissal. In a supporting affidavit, KIRO stressed the relevance of the materials sought to the issues of truth and public-figure status, as well as the prejudice to KIRO's trial preparation caused by Appellants' non-compliance. KIRO also noted Appellants' constant pattern of disobeying court orders compelling discovery and the likelihood that Appellants would, in the future, also refuse court-ordered discovery of membership records and apportation documents.

E. The Order of Dismissal.

On September 19, 1983, the court heard argument on Appellants' motion for reconsideration of the August 11 order and on the motions for dismissal by KIRO and KOMO. The court denied Appellants' motion, noting both that it was untimely and that it added nothing new to the arguments advanced by Appellants on August 11, 1983.

Because it did not have enough time available, the court did not enter an immediate order of dismissal. Appellants' attorney inquired whether belated compliance by Appellants would alter the sanctions imposed. The court indicated that in such a case it would likely impose terms for lateness but would not dismiss the action.

September 23, 1983, the parties returned for presentation of orders. Appellants still refused to comply with the court's order compelling production. The court thereupon entered orders of dismissal with prejudice and final judgments of dismissal as to KIRO and KOMO.

F. Subsequent Proceedings.

Appellants thereafter appealed to the Court of Appeals of the State of Washington, which affirmed the trial court's dismissal as not being an abuse of discretion. *Rhinehart v. KIRO, Inc.*, 44 Wn. App. 707, 723 P.2d 22 (1986). The Court of Appeals denied Appellants' motion for reconsideration by unpublished order entered September 11, 1986. The time period for filing a petition for review to the Washington Supreme Court expired October 13, 1986, without any action by Appellants.

On or about November 18, 1986, Appellants moved for an extension of time to file a petition for review. KIRO and KOMO opposed the motion. By letter dated January 16, 1987, the Washington Supreme Court directed Appellants to serve and file their proposed petition no later than February 2, 1987. This deadline came and went without service on either KOMO or KIRO. KOMO was eventually served on February 19, 1987, while KIRO was served on February 20, 1987.

On March 31, 1987, the Washington Supreme Court issued its order granting Appellants' motion for extension of time to file a petition for review and denying the petition for review on the merits. This appeal followed.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court.

Imposition of sanctions pursuant to Civil Rule 37, including dismissal of an action, is a matter of state law and is entrusted to the sound discretion of the trial court. *Associated Mortgage Investors v. G.P. Kent Construction Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976). In this case, the trial court's dismissal of Appellants' action was a permissible, indeed necessary, exercise of that discretion in view of Appellants' repeated, willful, and flagrant violations of discovery orders.

Contrary to Appellants' arguments, the dismissal of their action by the trial court raises neither important nor novel constitutional issues. The trial court's order compelling production did not unduly hamper Appellants in the exercise of their religion. The trial court's protective order was adequate to address their concerns and mirrored that considered by the state supreme court and this Court in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), *cert. denied*, 467 U.S. 1230 (1984).

Appellants' due process claim is similarly meritless. The trial court accorded Appellants repeated opportunities to comply with its order and gave specific notice to them of the consequence of continued defiance. Dismissal under these circumstances raises no issue of due process.

1. *Free Exercise Claim.* Appellants first attempt to characterize their repeated and flagrant noncompliance with discovery orders as behavior protected by the Free Exercise Clause of the first amendment. However, they never identify the religious beliefs or practices which are violated by the discovery orders. Contrary to Appellants' assertions, cases construing the Free Exercise Clause do not establish the principal that courts lack authority to govern production of religious documents.[5]

Government action challenged as a violation of the Free Exercise Clause, such as an order compelling discovery, must pass two threshold tests. The first test distinguishes between government regulation of religious belief, which is always impermissible, and restrictions affecting religious conduct,

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[5] Appellants cite no authority to support their position that a party claiming religious rights has exclusive control over the manner and extent of discovery of documents that it considers "sacred." Appellants' insistence on such control in this case is particularly ill-founded, because the trial court entered a protective order fully adequate to protect their legitimate interests.

which may be proper. *See Braunfield v. Brown*, 366 U.S. 599, 603 (1951) (freedom to act, even when action is in accord with religious convictions, is not totally free from legislative restrictions); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, (1940) (religiously motivated action may be regulated by state.)

The orders in issue here were permissible because they regulated what Appellants were required to do with their tapes if they wished to pursue their defamation claims and not what appellants were allowed or were required to believe.

The second threshold test under the Free Exercise Clause requires that the government action have both a secular purpose and a secular effect. *See Braunfield*, 366 U.S. at 607. Enforcement of the rules governing civil discovery has the secular purpose and effect of avoiding unfair surprise, permitting adequate trial preparation, and preserving order in the court's procedure. *Rhinehart v. Seattle Times Co.*, 467 U.S. at 34. Such rules are neither religiously motivated nor sectarian in their impact.

If, as in this case, the challenged government action passes these two tests, it is judged by balancing the cost to the government of altering its activity against the cost to the religious interest imposed by the government activity. *Gross v. City of Miami Beach*, 721 F.2d 729, 734 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984). Here, the trial court addressed the issue of governmental cost in its ruling on KIRO's and KOMO's motions to compel on August 11.

In ordering Appellants to produce the videotapes and documents, the trial court rejected as impractical Appellants' request that the court prescreen more than six hours of videotape to excise irrelevant portions, if any, or that the court adjudicate on a page-by-page basis whether copying of certain documents should be allowed. The trial court's order was proper, as scarce judicial resources cannot be wasted in over-

seeing a process designed to operate largely without judicial intervention. *Cf. Rhinehart v. Seattle Times Co.*, 467 U.S. at 36 ("heightened first amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals").

This Court has noted that the public interest requires a sound tax system and that such a system cannot accommodate "myriad exceptions flowing from a wide variety of religious beliefs." *United States v. Lee*, 455 U.S. 252, 260 (1982). The same can be said of our system of civil discovery. This system could not function if courts were forced to intercede in discovery disputes every time a litigant alleged that material was protected from discovery solely because of its religious significance.

Moreover, with respect to the burden imposed on their religion, Appellants failed to demonstrate to the trial court anything approaching the interest of the old-order Amish in preserving their way of life. Appellants expressed fear that the videotapes would be desecrated if viewed by Appellees' counsel. Yet they suggested judicial viewing of the same videotapes. It is not at all clear how this would have been less desecrating than a viewing by KIRO's and KOMO's attorneys. Appellants' fear of desecration seems unreasonable inasmuch as one of the tapes was broadcast on Japanese national television and another recorded a performance before 800 prison inmates. Neither did Appellants identify anything in their beliefs that might be threatened by production in accordance with the trial court's order.

In any event, Appellants' rights were adequately protected by the trial court's protective order. In *Rhinehart v. Seattle Times Co.*, the Washington Supreme Court summarily rejected similar objections to discovery:

> [C]ertain invasions of [plaintiffs' first amendment] rights are necessary to enable the courts to render a just decision

> upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. *The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right*. . . . All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

98 Wn.2d 226, 257-58, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20 (1984) (emphasis added).

Appellants' failure to address this holding forthrightly in their Jurisdictional Statement reflects their lack of candor throughout this protracted litigation. Appellants mention the case only once, and then in support of an insignificant fact. They fail to mention that they petitioned this Court for review of the Washington Supreme Court's decision. The issue they posed then in their petition for certiorari was as follows:

> Does the free exercise of religion clause of the first amendment preclude a state court from ordering a minority church and its spiritual leader to divulge names of members and donors in response to a pre-trial discovery request by the defendant newspaper in a common law libel action, where the church and its leader have been the target of physical and verbal attacks following defendants' publication of articles ridiculing the church and its leader?

This Court denied certiorari on this issue on June 4, 1984. 104 S. Ct. 2690 (1984).

2. *Due Process Claim.* Appellants assert that the trial court violated their constitutional right to due process by

dismissing with prejudice their claims against KIRO and KOMO. This assertion is meritless. This Court has not hesitated to uphold the sanction of dismissal where, as here, litigants willfully and flagrantly halt the discovery process in opposition to the authority of the court and cause impermissible prejudice to their opponents.

Appellants' argument was addressed by this Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). There, the Court upheld a trial court's dismissal of an antitrust action for the plaintiff's failure to comply with a court-ordered discovery deadline. Rejecting the plaintiffs' pleas for relief, the Court stated:

> [H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. at 643; *see also Founding Church of Scientology of Washington, D.C., Inc.*, 802 F.2d 1448, 1457-59 (D.C. Cir. 1986).

The U.S. Court of Appeals for the Ninth Circuit echoed these sentiments in *G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978):

> [T]he court dismissed the plaintiffs' action with prejudice. It acted properly in so doing. We encourage such orders. Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism.

Accord Hashemi v. Campaigner Publications, Inc., 737 F.2d 1584 (11th Cir. 1984) (affirming dismissal of libel action for failure to make discovery).

The Washington Supreme Court has likewise emphasized the necessity of having a "structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint." *Griggs v. Averback Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

The trial court in this case imposed lesser sanctions, to no end. It was patient. Three times it put Appellants on notice that the consequence of defiance was dismissal. *Cf. Jones v. Louisiana State Bar Association*, 602 F.2d 94 (5th Cir. 1979) (per curiam) (upholding dismissal where plaintiff refused to comply with discovery order despite warning that her suit would be dismissed and she would be held in contempt); *Associated Mortgage Investors v. G.P. Kent Construction Co.*, 15 Wn. App. at 228 (dismissal for failure to comply with an order that states prospective sanction comports with due process). Under these circumstances, the trial court properly dismissed Appellants' claims against Appellees.

CONCLUSION

For the reasons stated above, Appellees submit that this case presents no substantial question not previously decided by this Court. The appeal should be dismissed.[6]

DATED this 10th day of September, 1987.

Respectfully submitted,

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[6] Should the Court regard and act upon this appeal as a petition for a writ of certiorari, pursuant to 28 U.S.C. § 2103, Appellees urge the Court to deny the petition. Appellants do not suggest that any conflict exists between the decision in this case and any decision of another state court of last resort or of a federal court of appeals. Nor does this case present any important question that should be addressed by this Court.